IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC KEMSKE,	§	
	§	No. 168, 2006
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0503003266
	§	
Plaintiff Below, Appellee.	§	
	§	

Submitted: October 27, 2006
Decided: January 2, 2007

Before **HOLLAND, JACOBS,** and **RIDGELY**, Justices.

O R D E R

(1) Appellant Eric Kemske appeals his convictions by a Superior Court jury of one count of Sexual Exploitation of a Child, one count of Invasion of Privacy, and twenty-five counts of Possession of Child Pornography. Kemske makes two arguments on appeal. First, Kemske contends that there was insufficient evidence as a matter of law to support the Sexual Exploitation and Invasion of Privacy convictions. Second, he contends that the Superior Court should have *sua sponte* severed the charges against him and held two separate trials. We find no merit to his arguments and affirm.

(2) Kemske resided with his wife Michelle, their two children, a 10 year old girl and a 5 year old boy, and Michelle's 13 year old daughter, in a mobile home in Newark, Delaware. The home had three bedrooms. The family used one as a bedroom for Eric and Michelle, another as a bedroom for the three children, and the third was used as a home office. The home had one bathroom, which could be entered from the hallway and the home office.[1]

(3) On March 5, 2005, Michelle and her sister, Denise West, took Michelle's two girls to be fitted for a dress for Denise's wedding. During the trip, West informed Michelle that Kemske had sent her e-mail messages before Michelle and Kemske got married, informing West that he loved her. When Michelle returned, she searched Kemske's computer for the messages. While doing so, she found a video clip of Michelle's 13 year old daughter getting undressed and taking a shower. The video was apparently created on October 4, 2004 when Michelle's daughter was 12 years old.

(4) When Kemske went to work that evening, Michelle told her sister what she found. She then copied the video and took it to the New Castle County Police. An officer was sent to the home around 4:00 a.m. that morning and was shown the

[1] Kemske argues that the bathroom doors opened into the home office and the living room, while the State argues that the doors opened into the home office and the hallway. This factual dispute is not significant for purposes of this appeal.

video. The police seized Kemske's computer pursuant to a search warrant and arrested him.

(5) Stephen Bunting, a police computer forensics expert, testified at trial. He found numerous files containing child pornography on the computer. His forensic examination revealed that Kemske moved several child pornography files into a hidden folder on January 5, 2005. Included with those files was the video of Michelle's daughter. On January 9, 10 and 11, Kemske created a new e-mail account and used that address to set up a WinMX account for the purpose of downloading child pornography.[2] Kemske denied ever filming Michelle's daughter and using the computer to access child pornography. His defense was that his wife took the video and used his computer to access pornographic websites.

(6) Kemske first contends that the Superior Court erred in denying his motion for judgment of acquittal on the Sexual Exploitation and Invasion of Privacy charges. We review such claims *de novo* to determine "whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[3]

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[2] According to Mr. Bunting, "WinMX is a peer-to-peer file sharing software; it's like KAZAA [and] Napster. . . . Originally, these were developed to share music, but evolved into now being one of the primary forms of child pornography, movies of all sorts shared on the internet."
[3] *Hackett v. State*, 888 A.2d 1143, 1146 (Del. 2005).

(7) For a jury to find Kemske guilty of Sexual Exploitation of a Child, the State had to prove that Kemske did "film or photograph a child engaging in a prohibited sexual act."[4] Nudity is a prohibited sexual act only "if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction."[5]

(8) Kemske argues that the State did not produce any evidence to show that he made the video for sexual stimulation or gratification. He analogizes this offense with drug trafficking, and argues that drug trafficking requires the State to prove something more than possession, packaging and quantity. He argues that all the State proved in this case was that Kemske filmed the girl, but failed to prove that it was for sexual stimulation or gratification. He concedes that expert testimony is not required to demonstrate that the depiction was used for sexual stimulation.

(9) Proof of the purpose of the film can, and in this case was, proved by circumstantial evidence.[6] The film was stored on his computer as a "hidden file"

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[4] 11 *Del. C.* § 1108(a)(1) provides:

> A person is guilty of sexual exploitation of a child when: The person knowingly, photographs or films a child engaging in a prohibited sexual act or in the simulation of such an act, or otherwise knowingly creates a visual depiction of a child engaging in a prohibited sexual act or in the simulation of such an act; or

[5] 11 *Del. C.* § 1103(f).

[6] *See People v. Batchelor*, 800 P.2d 604-05 (Colo. 1990) ("Thus, the photographs and the *circumstances surrounding the photographs* indicated that [the defendant] secretly took the photographs . . . and that [the defendant] concealed the photographs from anyone else's view.

in a folder containing other files containing child pornography. In addition, the folder was named in such a way as to disguise the identity of its contents. From these facts, it was not unreasonable for the jury to infer that he made the film for the purpose of sexual stimulation or gratification.

(10) Kemske also claims that his Violation of Privacy conviction is unsupported by the evidence. Unlike his previous claim, Kemske did not move for a judgment of acquittal for this charge. We have declined to review claims for insufficiency of the evidence when not properly presented to the trial court.[7] When we have reached the merits of a claim of insufficient evidence not presented below we have reviewed the record for plain error.[8] Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[9] Such errors must be apparent on the face of the

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This was sufficient evidence from which the trier of fact could conclude beyond a reasonable doubt that [the defendant] took the photographs for the purpose of sexual gratification as required by the statute.").

[7] *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992) ("Although never explicitly considered, this Court has in the past reached the merits of claims of insufficient evidence even where they have not been fairly presented to the court below in jury trials. Today, in the exercise of our discretion, we decline to review this claim.") (citations omitted).

[8] *Wainright v. State*, 504 A.2d 1096, 1100 (Del. 1986) ("Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain.").

[9] *Id.*

record and be "so basic, serious and fundamental in their character that they clearly deprive an accused of a substantial right or show manifest injustice."[10]

(11) Kemske contends that, although one normally has an expectation of privacy in a bathroom, there could be no expectation of privacy in this case because there was no door separating the bathroom from the home office. In addition, there was testimony that the other bathroom door, connecting the bathroom to the living room or hall way,[11] was sometimes left open.

(12) No plain error occurred in this case. Michelle's daughter testified that when she took showers, Kemske would leave the home office and go into the living room in order to give the girl more privacy. In addition, the girl testified that Kemske would often remind her and the other children to close the bathroom door when they took showers. We find that there was sufficient evidence for a jury to conclude that the girl had a reasonable expectation of privacy

(13) Kemske's final claim of error is that the Superior Court should have *sua sponte* severed the exploitation and privacy count from the twenty-five Possession of Child Pornography counts. Joinder of parties and claims "promote[s] judicial economy and efficiency, provided that the realization of those

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[10] *Hunter v. State*, 788 A.2d 131 (Del. 2001) (TABLE).
[11] *See* footnote 1, *supra*.

objectives is consistent with the rights of the accused."[12] It is within the sound discretion of the trial court to grant or deny a motion for severance or *sua sponte* order that offenses be severed.[13] This Court will not overturn a decision on joinder or severance absent an abuse of discretion. In the context of a motion to sever, the defendant bears the burden of showing that substantial injustice resulted from a joint trial.[14]

> (14) Severance of offenses may be appropriate, when:
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> (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.

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[12] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1998) (quoting *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974)); Super. Ct. Crim. R. 8(a) provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

[13] *Wiest*, 542 A.2d at 1195; *Bradley v. State*, 559 A.2d 1234, 1241 ("The rule allows the court to order a severance *sua sponte*."); Super. Ct. Crim. R. 14.

[14] *Bradley*, 559 A.2d at 1241; *Wiest*, 542 A.2d at 1195; *see* Super. Ct. Crim. R. 14 ("[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses . . . the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.")

In addition to the above three circumstances, "a crucial factor to be considered in making a final determination on the motion should be whether the evidence of one crime would be admissible in the trial of the other crime."[15]

(15) Kemske did not seek a severance prior to trial. When he raised the issue after trial, the Superior Court correctly found that he had waived it. Moreover, the evidence supporting the possession of child pornography charges was relevant to support the charge of sexual exploitation in this case. Kemske's method of storing the video with his "collection" of child pornography was evidence that he made the video for the purpose of sexual stimulation. In this case, the files supporting Kemske's possession of pornography charges were probative of the *mens rea* required on the Sexual Exploitation charge. Kemske has not demonstrated an abuse of discretion by the Superior Court.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

[15] *Wiest*, 542 A.2d at 1195 n. 3.